

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DARRU K. "KEN" HSU, individually and  
as a trustee of the DARRU K. HSU AND  
GINA T. HSU LIVING TRUST, and on  
behalf of all others similarly situated,

Plaintiff,

v.

UBS FINANCIAL SERVICES, INC.,

Defendant.

No. C 11-02076 WHA

**ORDER RE MOTIONS FOR  
RECONSIDERATION,  
SUMMARY JUDGMENT,  
TRANSFER OF JURISDICTION,  
SANCTIONS, AND TO  
DECLARE PLAINTIFF A  
VEXATIOUS LITIGANT**

**INTRODUCTION**

This order arises from a putative class action dismissed in August 2011. *Pro se* plaintiff moves for reconsideration of a prior order and defendant moves to declare plaintiff a vexatious litigant. For the reasons explained below, all motions are **DENIED**.

**STATEMENT**

The background of this action is set forth in prior orders (Dkt. Nos. 35, 69). In brief, plaintiff Daru K. "Ken" Hsu entered into a wrap agreement with defendant UBS Financial Services, Inc. for investment and advisory services. Prior to this federal action, Hsu, proceeding with counsel, filed a claim with the Financial Industry Regulatory Authority. After the arbitration panel dismissed all claims over which it had jurisdiction, Hsu commenced this action under the Investment Advisers Act, alleging that defendant provided services "in its capacity as an investment advisor," but that a "hedge clause" in his agreement with defendant impermissibly required Hsu to waive certain rights under the Act (*see* Dkt. No. 17).

1           An August 2011 order dismissed Hsu's first amended complaint for failure to state a  
2 claim. Although the dismissal order permitted Hsu an opportunity to propose a second amended  
3 complaint, Hsu did not amend and judgment was entered in favor of defendant. Shortly  
4 thereafter, Hsu appealed. During the appeal process, Hsu terminated counsel and has since  
5 proceeded *pro se*. In February 2013, our court of appeals affirmed the dismissal for failure to  
6 state a claim, and later denied an en banc hearing. The Supreme Court denied a petition for a writ  
7 of certiorari in October 2013 (Dkt. Nos. 35, 41, 49–50, 54).

8           In 2014, again proceeding *pro se*, Hsu moved to set aside the judgment pursuant to FRCP  
9 60(b)(6) and FRCP 60(d)(3). The essence of Hsu's motion was that defendant had committed  
10 fraud on the court by falsifying two documents that it proffered for judicial notice on June 3,  
11 2011: (1) a signed agreement between Hsu and Horizon, independent of the wrap contract, and  
12 (2) the FINRA arbitration panel ruling. A March 2014 order denied Hsu's motion, finding that  
13 there was no evidence that the August 2011 dismissal order was undermined by the June 3  
14 documents, nor was there evidence that the dismissal order restricted Hsu's access to proper  
15 judicial review. Specifically with respect to plaintiff's claim of falsification, the 2014 order found  
16 that plaintiff had failed to clearly and convincingly demonstrate fraud on the court under FRCP  
17 60(d)(3) because, among other things, the 2011 dismissal order did not rely on either document in  
18 dismissing Hsu's complaint. Our court of appeals affirmed the denial of the motion, and the  
19 Supreme Court denied a petition for writ of certiorari (Dkt. Nos. 57, 69, 74–79).

20           In February 2018, Hsu again moved to set aside the judgment, this time pursuant to FRCP  
21 60(b)(4), but primarily based on the same argument that defendant falsified documents submitted  
22 in connection with its motion to dismiss and that the 2011 dismissal order had improperly relied  
23 on these materials without converting the motion to dismiss into a motion for summary judgment.  
24 Defendant, in turn, moved to have Hsu declared a vexatious litigant. An April 2018 order denied  
25 both motions, finding that Hsu had failed to establish that relief from judgment was warranted and  
26 that the record failed to demonstrate that Hsu was vexatious litigant (Dkt. Nos. 80–81, 87).

27           Hsu now brings a motion for reconsideration of the April 2018 order, rearguing the same  
28 arguments he raised in his motion to set aside the judgment pursuant to FRCP 60(b)(4). He also

1 moves to “transfer jurisdiction” and to disqualify the undersigned judge. Defendant again moves  
2 to declare Hsu a vexatious litigant (Dkt. Nos. 89–92). This order follows full briefing and oral  
3 argument.

#### 4 ANALYSIS

##### 5 1. MOTION FOR RECONSIDERATION.

6 This order treats Hsu’s motion for “reconsideration and summary judgment” as a motion  
7 for reconsideration. Hsu’s motion merely repeats arguments that have already been rejected in  
8 prior orders, namely that (1) the Court lacked subject-matter jurisdiction over the complaint, (2)  
9 defendant falsified two documents submitted in connection with its motion to dismiss, and (3) the  
10 2011 dismissal order relied on these falsified materials and improperly failed to convert  
11 defendant’s FRCP 12(b)(6) motion into a motion for summary judgment. Because Hsu merely  
12 repeats arguments previously rejected and fails to show “an intervening change of controlling  
13 law, the availability of new evidence, or the need to correct a clear error or prevent manifest  
14 injustice,” *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989),  
15 the motion for reconsideration is **DENIED**.

##### 16 2. MOTION TO DISQUALIFY.

17 Under Section 455 of Title 28 of the United States Code, a judge must disqualify himself  
18 “in any proceeding in which his impartiality might reasonably be questioned,” or, among other  
19 circumstances, where he has a “personal bias or prejudice concerning a party, or personal  
20 knowledge of disputed evidentiary facts concerning the proceeding.” The applicable standard is  
21 whether “a reasonable person with knowledge of all the facts would conclude that the judge’s  
22 impartiality might reasonably be questioned.” *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th  
23 Cir. 1993) (citation omitted). Hsu fails to provide any basis on which a reasonable person would  
24 conclude that the undersigned’s impartiality might reasonably be questioned or otherwise indicate  
25 any bias or prejudice. The motion to disqualify is **DENIED**.

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